



FIRE

Foundation for Individual
Rights in Education

January 23, 2018

Senator David Argall
Chairman, Senate Majority Policy Committee
171 Main Capitol
Harrisburg, PA 17120

Re: Written Supplemental Testimony of the Foundation for Individual Rights in Education for the January 23, 2018 hearing on Free Speech on College Campuses

Dear Chairman Argall and distinguished members of the Committee:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a Philadelphia-based nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

FIRE thanks the Committee for dedicating the time to address the issue of free speech on college campuses.

INTRODUCTION

Our public colleges and universities are “vital centers for the Nation’s intellectual life,” home to a “background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”¹ Despite the fact that the “essentiality of freedom in the community of American universities is almost self-evident,” far too many of our public institutions of higher education censor their students and faculty, restricting expressive activity in both policy and practice.² Speech codes—campus regulations that punish or restrict protected speech, or what would be protected speech in society at large—have repeatedly been struck down when challenged in court.³ Nevertheless, the majority of our nation’s colleges and

¹ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835–36 (1995).

² *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

³ *See, e.g., McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008); *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); *Smith v. Tarrant Cty. Coll. Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Booher v. N. Ky. Univ. Bd of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); *Corry v. Leland*

universities maintain speech codes, and institutions in Pennsylvania are no exception.⁴

Since FIRE's founding in 1999, FIRE has employed several strategies to defend free speech on campus. When colleges or universities have censored students or faculty members, FIRE has organized advocacy campaigns on their behalf. In July 2014, we launched our Stand Up For Speech Litigation Project to coordinate lawsuits aimed at eliminating unconstitutional speech codes through targeted First Amendment lawsuits.⁵ Last year, we initiated our brand new Million Voices Campaign, designed to free the voices of one million students by striking down unconstitutional speech codes across the country.⁶

In 2012, FIRE opened our Legislative and Policy Department because we observed that lawmakers and agencies were increasingly dictating that institutions adopt specific policies. Some of those policy mandates promoted individual rights, while others threatened them dramatically. Over the past six years, FIRE has worked with state legislators to pass bills promoting free speech on campus in states as varied as Virginia, Missouri, Utah, and Colorado. Each of those bills passed with overwhelming bipartisan support.

FIRE also works to defeat speech codes that chill speech and can be used to censor students and faculty by analyzing campus policies and rating them in our annual Spotlight on Speech Codes report. In that report, published annually since 2007, FIRE surveys publicly available policies at a sample of four-year public institutions and our nation's largest and/or most prestigious private institutions.⁷ FIRE rates colleges and universities as "red light," "yellow light," or "green light" based on how much, if any, protected speech their written policies restrict. A "red light" institution maintains at least one policy both clearly and substantially restricting freedom of speech, or bars public access to its speech-related policies by requiring a university login and password for access. A "yellow light" institution maintains at

Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wisc. 1991); *Doe v. Univ. of Mich.*, 721 F.Supp. 852 (E.D. Mich. 1989).

⁴ See FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2018: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, <https://www.thefire.org/spotlight-on-speech-codes-2018> [hereinafter Spotlight Report 2018].

⁵ Press Release, Found. for Individual Rights in Educ., FIRE Brings Four Free Speech Lawsuits in One Day (July 1, 2014), <https://www.thefire.org/fire-brings-four-free-speech-lawsuits-in-one-day>; see also STAND UP FOR SPEECH, <http://www.standupforspeech.com>.

⁶ Press Release, Found. for Individual Rights in Educ., Student sues Los Angeles Community College District to free over 150,000 students from unconstitutional 'free speech zones' (Mar. 28, 2017), <https://www.thefire.org/student-sues-los-angeles-community-college-district-to-free-over150000-students-from-unconstitutional-free-speech-zones>.

⁷ Speech Code Reports, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/spotlight/reports> (last visited Jan. 18, 2018).

least one policy that could be interpreted to suppress protected speech or a policy that, while clearly restricting freedom of speech, restricts only a narrow category of protected speech. If FIRE finds that a university's policies do not seriously threaten campus expression, that college or university receives a "green light" rating. FIRE often works directly with college administrators to reform their policies, in the hope that all colleges will earn green light ratings. We provide this service completely free of charge.

According to our latest data on the 30 Pennsylvania institutions rated in our 2018 Spotlight Report, only four — Carnegie Mellon University, Edinboro University of Pennsylvania, Shippensburg University of Pennsylvania, and the University of Pennsylvania — earn a "green light" rating. Sixteen Pennsylvania institutions have "yellow light" ratings,⁸ leaving 11 Pennsylvania institutions with "red lights."⁹ There is work to be done in Pennsylvania.

Institutions rarely label their policies that regulate speech on campus as "speech codes." Common examples of speech codes include policies on anti-harassment, civility, computer use, demonstration and distribution of literature, and posting policies. Policies on each of these topics may be crafted in ways that respect free speech, but all too often they are not.

OVERBROAD HARASSMENT CODES

Overbroad anti-harassment policies are the most common form of unduly restrictive speech code that infringes on students' free speech rights.

Harassment, properly defined, is not protected by the First Amendment. In the educational context, the Supreme Court has defined peer-on-peer harassment as discriminatory, unwelcome conduct "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). Harassment is extreme and usually repetitive behavior—behavior so serious that it would interfere with a reasonable person's ability to receive his or her education. In *Davis*, for example, the conduct found by the Court to be harassment was a months-

⁸ Pennsylvania institutions with "yellow light" ratings as of January 17, 2018 include: Bloomsburg University of Pennsylvania, Bucknell University, California University of Pennsylvania, Clarion University of Pennsylvania, East Stroudsburg University of Pennsylvania, Gettysburg College, Haverford College, Indiana University of Pennsylvania, Kutztown University of Pennsylvania, Lock Haven University of Pennsylvania, Millersville University of Pennsylvania, Slippery Rock University of Pennsylvania, Temple University, University of Pittsburgh, and West Chester University of Pennsylvania.

⁹ Pennsylvania institutions with "red light" ratings as of January 17, 2018 include: Bryn Mawr College, Cheyney University of Pennsylvania, Dickinson College, Drexel University, Franklin & Marshall College, Lafayette College, Lehigh University, Lincoln University, Mansfield University of Pennsylvania, Pennsylvania State University-University Park, and Swarthmore College.

long pattern of conduct including repeated attempts to touch the victim's breasts and genitals together with repeated sexually explicit comments directed at and about the victim.¹⁰

For decades now, however, too many colleges and universities have maintained policies that define harassment too broadly and prohibit constitutionally protected speech. Recently withdrawn guidance from the Department of Education's Office for Civil Rights (OCR), combined with that agency's aggressive enforcement of a speech-restrictive interpretation of Title IX, has exacerbated the problem by leading numerous colleges and universities to enact more restrictive policies in an effort to avoid an OCR investigation.

In May 2013, OCR issued a findings letter to the University of Montana, following investigation of the university's policies and practices, that proclaimed itself to be a "blueprint" for colleges and universities around the country.¹¹ In that letter, OCR stated that "sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature'" including "verbal conduct" (that is, speech). Although OCR backed away from its use of the term "blueprint" in a letter to FIRE (stating that "the agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy"), it never communicated this clarification directly to the many colleges and universities within its jurisdiction.¹²

Moreover, an April 2016 findings letter stemming from a Department of Justice (DOJ) investigation into the University of New Mexico's (UNM's) handling of sexual misconduct claims *explicitly reiterated* that in the view of the federal government, sexual harassment was not limited to quid pro quo and hostile environment harassment.¹³

Specifically, it found fault with UNM's policies on the grounds that:

each of these policies mistakenly indicates that unwelcome conduct of a sexual nature does not constitute sexual harassment until it causes a hostile environment or unless it is quid pro quo. Unwelcome conduct of a sexual nature, however, constitutes sexual harassment regardless

¹⁰ 526 U.S. at 633-34.

¹¹ Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice, and Gary Jackson, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont. and Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), *available at* <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

¹² Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Greg Lukianoff, President, Found. for Individual Rights in Educ. (Nov. 14, 2013), *available at* <http://www.thefire.org/letter-from-department-of-education-office-for-civil-rights-assistantsecretary-catherine-e-lhamon-to-fire>.

¹³ Letter from Shaheena Simons and Damon Martinez, U.S. Dep't of Justice to Robert G. Frank, President, Univ. of N.M. (Apr. 22, 2016), *available at* <https://www.justice.gov/opa/file/843901/download>.

of whether it causes a hostile environment or is *quid pro quo*. Indeed, federal guidance defines sexual harassment as “unwelcome conduct of a sexual nature.”¹⁴

This definition is deeply problematic. Unlike the definition set forth by the Supreme Court in *Davis*, defining sexual harassment as “unwelcome conduct of a sexual nature” conditions the permissibility of speech entirely on the subjective reaction of the listener—something courts have repeatedly held violates the First Amendment.¹⁵ Moreover, even speech that is objectively offensive may still be constitutionally protected unless it “effectively bars the victim’s access to an educational opportunity or benefit,” whereas the definition put forth by OCR and DOJ includes all “unwelcome” verbal conduct of a sexual nature, no matter how minor.

As a result, many colleges and universities revised their sexual harassment policies to include the broad definition prescribed by OCR and DOJ. For example, at Penn State, sexual harassment is defined as “verbal or physical conduct of a sexual nature that is unwanted, inappropriate, or unconsented to.”¹⁶

The Penn State policy, along with far too many others, demonstrates that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even *approach* actual harassment, despite similar policies having been struck down by federal courts years earlier. These vague and overly broad harassment policies deprive students and faculty of their free speech rights.

Last year, the Tennessee legislature passed legislation that included a provision codifying the *Davis* definition of student-on-student harassment.¹⁷ Pennsylvania should follow suit.

¹⁴ *Id.*

¹⁵ *See DeJohn v. Temple Univ.*, 537 F.3d 301, 318 (3d Cir. 2008) (holding that because university policy failed to require that the speech in question “objectively” create a hostile environment, it provided “no shelter for core protected speech”). *See also Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (“[R]egulations that prohibit speech on the basis of listener reaction alone are unconstitutional both in the public high school and university settings.”).

¹⁶ *Pennsylvania State University Policy AD85: Sexual and/or Gender-Based Harassment and Misconduct (Including Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking and Related Inappropriate Conduct)*, available at <https://guru.psu.edu/policies/ad85.html>

¹⁷ <http://www.capitol.tn.gov/Bills/110/Amend/SA0333.pdf>

RESTRICTIONS ON STUDENT PROTESTS AND DISTRIBUTION OF LITERATURE

Another form of speech code that continues to infringe on free speech on campus is the use of unconstitutional restrictions on student protest and distribution of literature.

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and other expressive activities from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to maintain an environment conducive to education.

Prior Restraints

The Supreme Court has held that “[i]t is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). Yet many colleges and universities do just that, requiring students and student organizations to register their expressive activities well in advance and, often, to obtain administrative approval for those activities.

Millersville University of Pennsylvania’s Advertising and Promotions Policy¹⁸, for example, states:

All intended promotions must be submitted for review and approval to the SMC Information Desk, the SMC Operations Manager or the SMC Evening Operations Manager may only approve the material.

[...]

The SMC Operations Manager or the SMC Evening Operations Manager must view all handouts intended for distribution.

[...] Distribution of handouts is not permitted without prior approval.

Kutztown University of Pennsylvania maintains a similarly problematic policy¹⁹:

¹⁸ Millersville University of Pennsylvania Advertising and Promotions Policy, *available for download at* https://www.millersville.edu/csil/files/Advertsing_Promotions_Policy.docx.

¹⁹ Kutztown University of Pennsylvania Solicitation and Public Demonstration Policy, *available at* <https://d28htnjz2elwuj.cloudfront.net/wpcontent/uploads/2015/10/12040000/solicitation.pdf>.

Solicitation refers to such activities as recruitment, distribution of information materials, events promotion and other similar activities which do not include the sale of goods or services or solicitation of funds. ... Solicitation may take place outdoors. The Director of Public Safety and Police Services, together with the Director for Student Involvement, will determine where the solicitation may occur. Exceptions to this requirement can only be made by the President of the University or designee.

[...]

Any group or organization planning to schedule a public demonstration or rally must meet with the Director of Public Safety and Police Services, or designee to describe the activity and seek permission.

These demands that students seek permission in order to be allowed to speak are not constitutional.

Free Speech Zone Policies

FIRE surveyed speech codes at 461 colleges for our most recent annual report on campus speech codes. Of those 461 schools, roughly 1 in 9 have “free speech zone” policies—policies limiting student demonstrations and other expressive activities to small and/or out-of-the-way areas on campus.²⁰ Such policies are generally inconsistent with the First Amendment, and they have repeatedly been struck down by courts or voluntarily revised as part of lawsuit settlements.

FIRE’s Stand Up For Speech Litigation Project has included successful challenges to free speech zone policies at Modesto Junior College; the University of Hawaii at Hilo; Citrus College; California State Polytechnic University, Pomona; Dixie State University; and Blinn College.²¹ Just last week, FIRE won a key victory in our latest

²⁰ Spotlight Report 2018, *supra* note 4.

²¹ Press Release, Found. for Individual Rights in Educ., Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs ‘Special Permission’ (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission>; Press Release, Found. for Individual Rights in Educ., Victory: Lawsuit Settlement Restores Free Speech Rights at Dixie State U. After Censorship of Bush, Obama, Che Flyers (Sept. 17, 2015), <https://www.thefire.org/victory-lawsuit-settlement-restores-free-speech-rights-at-dixie-state-u-after-censorship-of-bush-obama-che-flyers>; Press Release, Found. for Individual Rights in Educ., Victory: Animal Rights Activist Restores Free Speech Rights of Cal Poly Pomona Students with Lawsuit Settlement (July 23, 2015), <https://www.thefire.org/cases/california-polytechnic-state-university-stand-up-for-speech>; Press Release, Found. for Individual Rights in Educ., Second Victory in 24 Hours: College that Suppressed Anti-NSA Petition Settles Lawsuit (Dec. 3, 2014), <https://www.thefire.org/second-victory-24-hours-college-suppressed-anti-nsa-petition-settles-lawsuit>; Press Release, Found. for Individual

challenge to a free speech zone policy when a federal court in California denied Los Angeles Pierce College's motion to dismiss a lawsuit filed by student Kevin Shaw, who had sued after he was told that he could not hand out Spanish-language copies of the U.S. Constitution outside Pierce's tiny "free speech zone," which comprises just .003 percent of campus.²²

DISINVITATIONS AND THE HECKLER'S VETO

2017 was punctuated by two highly visible and violent campus assaults on freedom of expression. Protesters at the University of California, Berkeley caused over \$100,000 in damage and several injuries while violently protesting an appearance by conservative commentator Milo Yiannopoulos, causing the event to be canceled.²³ Only three arrests were made by the police.²⁴ Perhaps seizing on the message sent by the lack of consequences for the Berkeley rioters,²⁵ students at Middlebury College in Vermont disrupted an event featuring Charles Murray, forcing the event to be relocated to and live-streamed from a private, remote location with only Murray and Middlebury professor Allison Stanger present.²⁶ Protesters became aware of the new location and attacked Murray and Stanger, surrounding their car and sending Stanger to the emergency room.²⁷

These are but two of the most recent examples of the illiberal phenomenon FIRE calls "disinvitation," a trend that has been rising since 2000.

Simply put, the disinvitation phenomenon is the increased demand by some students and faculty that speakers with whom they disagree be prevented from

Rights in Educ., U. of Hawaii Settles Lawsuit Over Handing Out Constitutions (Dec. 2, 2014), <https://www.thefire.org/u-hawaii-settles-lawsuit-handing-constitutions>; Press Release, Found. for Individual Rights in Educ., Victory: Modesto Junior College Settles Student's First Amendment Lawsuit (Feb. 25, 2014), <https://www.thefire.org/victory-modesto-junior-college-settles-studentsfirst-amendment-lawsuit>.

²² Press Release, Found. for Individual Rights in Educ., Court rejects motion to dismiss student lawsuit targeting Los Angeles Pierce College's tiny 'free speech zone' (Jan. 18, 2018), <https://www.thefire.org/court-rejects-motion-to-dismiss-student-lawsuit-targeting-los-angeles-pierce-colleges-tiny-free-speech-zone>.

²³ Rick Hurd, *UC Berkeley condemns violent Milo Yiannopoulos protests*, EAST BAY TIMES (Feb. 2, 2017), <http://www.eastbaytimes.com/2017/02/02/uc-berkeley-classes-open-after-miloyiannopoulos-protests>.

²⁴ *Id.*

²⁵ Robert Shibley, *Colleges are ground zero for mob attacks on free speech, lawyer says*, WASH. POST (Mar. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/03/07/colleges-are-ground-zero-for-mob-attacks-on-free-speech-lawyer-says>.

²⁶ Scott Jaschik, *Shouting Down a Lecture*, INSIDE HIGHER ED (Mar. 3, 2017), <https://www.insidehighered.com/news/2017/03/03/middlebury-students-shout-down-lecturecharles-murray>.

²⁷ Robby Soave, *A Professor Who Attended Charles Murray's Middlebury Talk Is Now Wearing a Neck Brace. Protesters Attacked Her.*, REASON (Mar. 3, 2017), <http://reason.com/blog/2017/03/03/a-professor-who-attended-charles-murrays>.

speaking on campus (as opposed to critics merely expressing disagreement with, or even protesting, an invited speaker's views or positions). While originally most noticeable around commencement season due to the high-profile status of many commencement speakers, disinvitations occur all year—and have been on the increase over the past 15 years.²⁸

Successful disinvitations are categorized into three distinct types. First, formal disinvitations occur when a speaker's invitation is revoked or withdrawn. The second category consists of incidents in which speakers withdraw from campus speaking engagements in the face of demands that they be disinvited. Finally, FIRE regards as disinvitations those instances where audience members persistently disrupt or entirely prevent a speaker's ability to speak.

FIRE first began officially documenting the disinvitation phenomenon in 2014, when we conducted in-depth research into disinvitation attempts since 2000 and published a report with our findings.²⁹ We have since made our data available to the public for examination in a database hosted on our website.³⁰ While our data is necessarily incomplete and imperfect, that data shows an upward trend and raises cause for concern. In 2016, FIRE documented at least 43 disinvitation attempts—the most in a single year in the 16 years of data we have amassed—more than half of which were successful.³¹

In addition to a rise in the number of disinvitation attempts, our data indicates that disinvitation attempts are increasingly being aimed not at commencement speakers—where protesters often argue that they should not be subjected to the views of individuals they find disagreeable on their “special day”³²—but at campus panels and speaking engagements. From 2000–2014, nearly half of all disinvitation attempts targeted commencement speakers.³³ But from 2015–2016, 80% of disinvitation attempts focused on other speakers invited to campus.³⁴ This troubling shift underscores the new demand for freedom *from* speech, in which campus

²⁸ FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., DISINVITATION REPORT 2014:A DISTURBING 15-YEAR TREND, (May 28, 2014), <https://www.thefire.org/disinvitation-season-report-2014>.

²⁹ *Id.*

³⁰ FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., DISINVITATION DATABASE, <https://www.thefire.org/resources/disinvitation-database>.

³¹ Alex Morey, *Campus Disinvitations Set Record in 2016*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (Dec. 20, 2016), <https://www.thefire.org/campus-disinvitations-set-record-in-2016>. While the article states that 2016 saw 42 disinvitation attempts, that data has since been updated.

³² Greg Lukianoff, *New Report: The Push Against Campus Speakers Is Getting More Intense*, HUFFINGTON POST (May 30, 2014), http://www.huffingtonpost.com/greg-lukianoff/new-report-the-push-again_b_5417664.html.

³³ DISINVITATION DATABASE, *supra* note 29.

³⁴ *Id.*

community members seek to prevent ideas or views they find disagreeable from being discussed and debated by *anyone*.

The dangers posed by the disinvitation phenomenon are clear. In refusing to hear out a speaker with whom they disagree—often with regard to topics unrelated to their planned remarks—students hinder their intellectual development. Learning how to think critically, grapple with opposing viewpoints, and formulate arguments supporting one’s position is crucial to the enterprise of higher education, and illiberal demands to banish speakers from campus due to disagreement with their views are an unfortunate sign that our colleges and universities are not doing enough to instill that foundational concept in students.

Unfortunately, the disinvitation phenomenon shows no sign of abating. FIRE tracked 29 disinvitation attempts in 2017.³⁵

BIAS REPORTING TEAMS

Another growing trend is for colleges and universities to implement “bias reporting systems” encouraging students to report on one another—and on faculty members—whenever they subjectively perceive that someone’s speech or expression is biased. These systems often subject students and faculty members to intervention by conflict-wary administrators providing “education,” if not punishment, for engaging in vaguely defined acts of “bias.” Although bias reporting systems are not new, they have proliferated in recent years.

To better understand this phenomenon, FIRE gathered data throughout 2016 on every bias reporting system we could locate—231 in total. FIRE sought to determine who reviews the bias reports, what categories of bias they are charged with addressing, and whether the institution acknowledges that the system generates a tension with free speech and academic freedom.³⁶

Among other things, we found that universities tend to cast a wide net when defining “bias,” soliciting reports on a broad range of constitutionally protected speech and expression. The exceedingly predictable result of these types of broad definitions is that administrators monitor political and academic speech in an effort to avoid controversy and controversial speech. In turn, administrators encourage faculty members and students to avoid controversial subjects, under the guise of “educating” them. The result is an impermissible chilling effect on free speech.

For example, the University of Northern Colorado (UNC) abolished its controversial Bias Response Team after faculty members were told to avoid

³⁵ *Id.*

³⁶ FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., BIAS RESPONSE TEAM REPORT 2017, <https://www.thefire.org/fire-guides/report-on-bias-reporting-systems-2017>.

controversial subjects. One faculty member who was reported to the UNC Bias Response Team—after encouraging his students to consider countering views—recorded an administrator warning him away from discussing controversial subjects, lest he be summoned by more aggressive investigators.³⁷

It is not just faculty members who are targeted by bias response teams. At the University of Oregon (UO), where the Bias Response Team solicits reports of bias against “political or religious ideology,” a “Case Manager” intervened with a student newspaper’s reporter and editor after a student complained that the paper “gave less press coverage to trans students and students of color.” Other complaints alleged that a faculty member “belittled” a student’s “request for trigger warnings” and that students expressed “anger” over “oppression.” Based on these vague reports published by UO, FIRE issued a public records request for documents showing the complaints and how UO’s Bias Response Team intervened. UO went to great lengths to resist this request, arguing that it was not in the public interest to share information on how its team operates.³⁸

PROTECTING THE STUDENT PRESS

Student newspapers often serve the vital functions of reporting on matters of public concern and providing commentary on political issues. But student journalists are often chilled from performing these functions when they are punished, or subjected to prolonged investigations, because professors or administrators object to the content or viewpoint of published pieces.

In April 2013, for example, the University of Alaska Fairbanks’ student newspaper, *The Sun Star*, published an April Fools’ Day article that described the university’s plans to build a “new building in the shape of a vagina” and was illustrated with a picture from the 1998 PG-13 rated film *Patch Adams*.³⁹ Shortly thereafter, the paper published an investigative piece about the “UAF Confessions” page on Facebook, including screenshots of public posts and an interview with the target of some

³⁷ Adam Steinbaugh, *University of Northern Colorado Defends, Modifies ‘Bias Response Team’ as Criticism Mounts and Recording Emerges*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (July 7, 2016), <https://www.thefire.org/university-of-northern-colorado-bias-response-team-recordingemerges/>.

³⁸ Adam Steinbaugh, *University of Oregon on ‘Bias Response Team’: Nothing to See Here*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (May 27, 2016), <https://www.thefire.org/university-of-oregon-on-bias-response-team-nothing-to-see-here>.

³⁹ Press Release, Found. for Individual Rights in Educ., *Victory: Free Press Vindicated at University of Alaska Fairbanks* (Feb. 11, 2014), <https://www.thefire.org/victory-free-press-vindicated-at-university-of-alaska-fairbanks>; Lakeidra Chavis, *UAF announces plans for new Kameel Toi Henderson Building in honor of 59 percent female demographic*, SUN STAR (Mar. 26, 2013), <https://www.uafsunstar.com/uaf-announces-plans-for-new-kameel-toi-henderson-building-in-honor-of-59-percent-female-demographic>.

insulting remarks on the page.⁴⁰ A UAF professor reported both of these articles as “sexual harassment.”⁴¹ The paper remained under investigation until February 2014—nearly a year—despite the fact that the articles were unequivocally protected expression under the First Amendment.⁴² The editor-in-chief of the newspaper told FIRE that as a result of the investigation, she felt compelled to abandon her plans to publish an informational piece on campus sexual assault. She was worried that, too, would offend someone and land her in trouble.⁴³

Inappropriate investigations are not the only tool universities use to hinder the student press; student newspapers have also been defunded because of content- or viewpoint-based objections to articles. For example, in November 2015, administrators at the University of California, San Diego publicly condemned a controversial article by satirical student newspaper *The Koala*, which mocked the use of “safe spaces” and “trigger warnings.”⁴⁴ The same day, the university’s student government voted to remove funding from all student print media in an effort to hamstring *The Koala*.⁴⁵ Another UCSD student newspaper reported that student government members were open about their motivation and agreed to help all other student publications besides *The Koala* find other sources of funding.⁴⁶ FIRE wrote a letter to the university explaining that it must ensure mandatory student fees are distributed in a viewpoint-neutral manner, as mandated by Supreme Court precedent.⁴⁷ Unfortunately, this time, the university couldn’t be convinced to abide by its legal obligations. *The Koala* sued the university, and in February 2017, a judge ignored several lines of longstanding case law in order to dismiss the lawsuit.⁴⁸

Two court rulings present a particular threat to student journalists. In 1988, the Supreme Court of the United States ruled in *Hazelwood School District v. Kuhlmeier* that the First Amendment did not prohibit a public high school from making

⁴⁰ Annie Bartholomew, *UAF Confessions harbors hate speech*, SUN STAR (Apr. 23, 2013), <https://www.uafsunstar.com/uaf-confessions-harbors-hate-speech>.

⁴¹ Victory: Free Press Vindicated at University of Alaska Fairbanks, *supra* note 38.

⁴² *Id.*

⁴³ TheFIREorg, *Chilled in Alaska: Student Newspaper Investigated for Nearly a Year for Protected Speech*, YOUTUBE (Sept. 19, 2014), <https://www.youtube.com/watch?v=DCgYHj8E3LE>.

⁴⁴ Letter from Marieke Tuthill Beck-Coon, Senior Program Officer, Individual Rights Defense Program, Found. for Individual Rights in Educ., to Pradeep K. Khosla, Chancellor, Univ. of Cal., San Diego, and Dominick Suvonnasupa, President, UCSD Associated Students (Dec. 14, 2015), *available at* <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/12/18145123/2015-FIRELetter-to-UCSD-12.14.15-copy.pdf>.

⁴⁵ *Id.* at 2; Naftali Burakovsky, 11/18 A.S. Council, THE GUARDIAN (Nov. 19, 2015), <http://ucsdguardian.org/2015/11/19/1118-a-s-council>.

⁴⁶ Burakovsky, *supra* note 44.

⁴⁷ Letter from Marieke Tuthill Beck-Coon, *supra* note 43.

⁴⁸ *Koala v. Khosla*, No. 16cv1296 JM(BLM), 2017 U.S. Dist. LEXIS 29124 (S.D. Cal. Feb. 28, 2017); *see also* Adam Goldstein, *In flawed opinion, district court dismisses The Koala’s lawsuit*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC.: NEWSDESK (Mar. 3, 2017), <https://www.thefire.org/in-flawed-opiniondistrict-court-dismisses-the-koalas-lawsuit>.

editorial decisions about a newspaper produced as part of a class curriculum, “so long as [the decisions] are reasonably related to legitimate pedagogical concerns.”⁴⁹

In 2005, the U.S. Court of Appeals for the Seventh Circuit extended *Hazelwood*’s holding to the context of higher education in *Hosty v. Carter*. The court held that a public college’s administration did not violate the First Amendment when it demanded prior review of the student newspaper due to disapproval of the newspaper’s content, effectively limiting the rights of adult journalists to those of schoolchildren.⁵⁰ In 2006, the Supreme Court declined to hear the case.⁵¹ As a result, college and university journalists in Illinois, Indiana, and Wisconsin were left vulnerable to content-based censorship and the door was left open for other jurisdictions to follow in *Hosty*’s footsteps.

As discussed below, lawmakers in a growing number of states have taken legislative action to correct the abuses enabled by *Hazelwood* and *Hosty*, and I urge you to follow their lead.

The entire campus community suffers a loss when student publications cannot decide for themselves what topics to cover and how, without fear of punishment by the university or its agents. When student journalists are at risk of retaliation based on the content they publish, they are more likely to shy away from coverage of controversial issues and criticism of the status quo—critically important functions of the press.

SOLUTIONS

The Campus Anti-Harassment Act

Despite the Supreme Court’s clear guidance, far too many universities continue to maintain harassment policies that fall short of the Court’s *Davis* standard and prohibit or threaten speech protected by the First Amendment—or, in the case of private universities, speech protected by the school’s own promises.

Overly broad and vague harassment and bullying policies benefit no one. Colleges risk lawsuits by chilling or punishing protected speech, while students learn the wrong lesson about their expressive rights, concluding that self-censorship is safer than risking discipline for speaking their mind. Thankfully, the solution is simple: Pennsylvania should require universities to implement anti-discriminatory harassment policies that precisely track the Supreme Court’s *Davis* standard. By simply incorporating a definition carefully crafted by the Supreme Court, such a requirement would end decades of confusion and the abuse of harassment policies

⁴⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

⁵⁰ *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005).

⁵¹ *Hosty v. Carter*, 546 U.S. 1169 (2006).

on campus, eliminating what has historically been the most common form of speech code.

Precisely defining peer-on-peer harassment as no more or less than the requirements of *Davis* will ensure that institutions have the ability to meet both their legal and moral obligations to maintain campus environments free from discriminatory harassment while protecting free speech. These twin responsibilities need not be in tension. Accordingly, FIRE urges the Pennsylvania General Assembly to pass legislation that would codify the *Davis* standard. **FIRE has attached draft legislation—the Campus Anti-Harassment Act—as Appendix A.**

The Campus Free Expression Act

Restricting student speech to tiny free speech zones diminishes the quality of debate and discussion on campus by preventing expression from reaching its target audience. Moreover, many of the institutions that maintain these restrictive policies also employ burdensome permitting schemes that require students to obtain administrative and law enforcement permission days or even weeks before being allowed to speak their minds. Even worse, many of these policies grant campus administrators unfettered discretion to deny applications based on the viewpoint or content of the speakers' intended message. A recent study conducted by FIRE concluded that roughly 1 in 9 of America's top 400 universities restricted student expression with free speech zones.⁵²

These free speech quarantines persist despite an overwhelming string of defeats in court. In 2012, a federal court in Ohio struck down the University of Cincinnati's tiny "free speech zone" as unconstitutional. In 2014, Modesto Junior College⁵³ and the University of Hawaii at Hilo⁵⁴ both settled lawsuits brought by students who were prohibited from distributing copies of the U.S. Constitution because they were not in their campuses' free speech zones. Alliance Defending Freedom is counsel in a similar case where students were arrested for distributing copies of the U.S. Constitution outside of Kellogg Community College's free speech zone.⁵⁵ These policies aren't used only against students trying to distribute copies of the U.S. Constitution. Last year in a lawsuit sponsored by FIRE, a student-plaintiff settled her lawsuit against Blinn College after it told her she needed special permission to

⁵² Spotlight Report 2018, *supra* note 4.

⁵³ Press Release, Found. for Individual Rights in Educ., Victory: Modesto Junior College Settles Student's First Amendment Lawsuit (Feb. 25, 2014) <https://www.thefire.org/victory-modestojunior-college-settles-students-first-amendment-lawsuit>.

⁵⁴ Press Release, Found. for Individual Rights in Educ., U. of Hawaii Settles Lawsuit Over Handing Out Constitutions (Dec. 2, 2014) <https://www.thefire.org/u-hawaii-settles-lawsuit-handingconstitutions>.

⁵⁵ Press Release, Alliance Defending Freedom, Student Club Supporters Arrested for Handing Out US Constitution at Michigan College, ADF Sues, (Jan. 18, 2017), <http://www.adfmedia.org/News/PRDetail/10155>.

advocate for gun rights outside of the school's tiny free speech zone.⁵⁶ A settlement was also reached with California State Polytechnic University, Pomona after it prohibited a student from handing out flyers about animal abuse outside of the school's free speech zone.⁵⁷

The continued maintenance of free speech zones benefits no one. Properly recognizing outdoor areas on public campuses as public forums, subject only to reasonable, content- and viewpoint-neutral time, place, and manner restrictions will ensure that our public universities continue to be a traditional space for debate, aptly and memorably recognized by the Supreme Court as “peculiarly the ‘marketplace of ideas.’” **FIRE has attached draft legislation—the Campus Free Expression Act—as Appendix B.**

The New Voices Act

Thirteen states—including Illinois, where *Hosty* originated—have passed laws to protect student journalists from the kind of administrative intervention sanctioned by the courts in *Hazelwood* and *Hosty*.⁵⁸ The Pennsylvania Legislature should extend this protection to students in the keystone state by passing a New Voices Act.

The Student Press Law Center⁵⁹ and its New Voices USA campaign⁶⁰ have been a driving force in crafting and implementing legislative solutions to the serious problem of campus newspaper censorship. The New Voices movement aims to “give young people the legally protected right to gather information and share ideas about issues of public concern.”⁶¹

⁵⁶ Press Release, Found. for Individual Rights in Educ., Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs ‘Special Permission’ (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission>.

⁵⁷ Press Release, Found. for Individual Rights in Educ., Victory: Animal Rights Activist Restores Free Speech Rights of Cal Poly Pomona Students with Lawsuit Settlement (July 23, 2015), <https://www.thefire.org/cases/california-polytechnic-state-university-stand-up-for-speech>.

⁵⁸ Arkansas (Ark. Code Ann. § 6-18-1203), California (Cal. Educ. Code § 48907), Colorado (Colo. Rev. Stat. § 22-1-120), Illinois (105 Ill. Comp. Stat. Ann. 80/10), Iowa (Iowa Code § 280.22), Kansas (Kan. Stat. Ann. § 72-1506), Maryland (Md. Code Ann., Educ. §§ 7-121 & 15-119), Massachusetts (Mass. Ann. Laws ch. 71, § 82), Nevada (Nev. Rev. Stat. Ann. § 388.077), North Dakota (N.D. Cent. Code §§ 15.1-19-25 & 15-10-55), Oregon (Or. Rev. Stat. Ann. §§ 336.477 & 350.260), Rhode Island (R.I. Gen. Laws § 16-109-2), and Vermont (16 V.S.A § 180, 16 V.S.A. § 1623) have enacted laws protecting student journalists.

⁵⁹ See *Cure Hazelwood*, STUDENT PRESS LAW CENTER, <http://www.splc.org/section/cure-hazelwood> (last visited Jan. 18, 2018).

⁶⁰ Talking Points, NEW VOICES USA, <http://newvoicesus.com/talkingpoints> (last visited Jan. 18, 2018).

⁶¹ *Id.*

North Dakota's John Wall New Voices Act,⁶² for example, on which other states have modeled their bills, provides that:

a student journalist has the right to exercise freedom of speech and of the press in school-sponsored media, regardless of whether the media is supported financially by the school district, by use of facilities of the school district, or produced in conjunction with a class in which the student is enrolled. Subject to subsection 3 [providing exceptions for defamation, invasion of privacy, violations of state or federal law, and incitement], a student journalist is responsible for determining the news, opinion, feature, and advertising content of school-sponsored media.

The proliferation and success of these bills is a positive step for freedom of the press at schools across the country.

Too many student journalists, however, remain unprotected from censorship and punishment. It is imperative that student journalists enjoy robust protections for their journalistic speech regardless of the jurisdiction in which they are attending university. Enacting a New Voices law would help ensure a free student press in Pennsylvania. **FIRE has attached a copy of North Dakota's John Wall New Voices Act to serve as a model for Pennsylvania as Appendix C.**

CONCLUSION

FIRE's recommendations are intended to assist your Committee in defending and promoting students' free speech rights at institutions of higher education throughout Pennsylvania, so that they can truly fulfill their promise as the marketplaces of ideas.

Thank you for your continued interest in supporting free speech on campus and for your attention to FIRE's proposals. If you are interested in discussing our suggestions further, or have any questions about FIRE's work, please feel free to contact us at (215) 717-3473. We can also be reached by email at joe@thefire.org or tyler@thefire.org.

Respectfully submitted,



Joseph Cohn
Legislative and Policy Director



Tyler Coward
Legislative Counsel

⁶² N.D. Cent. Code §§ 15.1-19-25.

APPENDIX A

A BILL

To define discriminatory harassment in higher education, and for other purposes.

SEC. 1. CAMPUS ANTI-HARASSMENT ACT.

This Act may be cited as the "Campus Anti-Harassment Act."

SEC. 2. FINDINGS.

- (1) Educational institutions should facilitate the free and open exchange of ideas.
- (2) All public educational institutions are required by the First Amendment to the United States Constitution to protect and honor students' freedom of speech.
- (3) Private educational institutions are not bound by the First Amendment to the Constitution. Nevertheless, many private educational institutions explicitly promise students freedom of speech.
- (4) All public educational institutions and private educational institutions that accept federal funding are obligated under Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], and the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.] to take immediate action to eliminate discriminatory harassment, prevent its recurrence, and address its effects.
- (5) In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Supreme Court of the United States provided a clear definition of peer harassment in the educational context that simultaneously prohibits harassment and protects speech.
- (6) The Court determined that schools must respond to discriminatory conduct "that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."
- (7) Despite this clear definition, many educational institutions maintain overly broad or vague harassment policies that threaten students' right to freedom of expression.

SEC. 3. DEFINITIONS.

In this Act:

- (1) EDUCATIONAL INSTITUTION- The term `educational institution' means an institution of higher education, as defined in [Citation to state statute];

SEC. 4. ELIMINATING DISCRIMINATORY HARASSMENT AND PROTECTING FREE SPEECH.

(1) Educational institutions are prohibited from punishing as discriminatory harassment student speech that does not constitute actionable discriminatory harassment as defined herein.

(2) Speech shall only constitute actionable discriminatory harassment when directed at an individual and:

(a) part of a pattern of targeted, unwelcome conduct that is discriminatory on the basis of race, color, national origin, disability, religion, age, sex, sexual orientation, gender, or gender identity;

(b) so severe, pervasive, and objectively offensive;

(c) and that so undermines and detracts from the victim's educational experience that the victim-student is effectively denied equal access to an institution's resources and opportunities.

(3) An educational institution is not liable under this Act for failing to punish speech that does not satisfy Section 4(2) herein.

(4) When conduct meets the definition of actionable discriminatory harassment set forth in Section 4(2) herein, educational institutions shall take immediate action to eliminate the discriminatory harassment and address its effects.

(5) An educational institution may be held liable for violations of this act, if it is deliberately indifferent to known acts of actionable discriminatory harassment as defined in Section 4(2) herein.

SEC. 5. CAUSE OF ACTION.

(1) The following persons may bring an action in any State court of competent jurisdiction to enjoin violation of this Act. The court may award compensatory damages, reasonable court costs, and attorneys' fees, including expert fees, or any other relief in equity or law as deemed appropriate:

(a) the attorney general;

(b) any aggrieved person whose expressive rights were infringed upon through violation of this Act.

(2) In an action brought under Subsection (5), if the court finds a violation of this Act, the court shall award the aggrieved person not less than \$1000.

(3) The state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of this Act.

(4) In a suit against a State for a violation of this statute referred to in section (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a State.

SEC. 6. STATUTE OF LIMITATIONS.

(1) A person must bring suit for violation of this Act not later than one year after the day the cause of action accrues.

(2) For purposes of calculating the one-year limitation period in cases alleging unlawful punishment for expression protected under this act, the cause of action shall be deemed accrued on the date that the student receives final notice of discipline from the educational institution for the protected expression.

(3) For purposes of calculating the one-year limitation period in cases alleging deliberate indifference to known acts of actionable discriminatory harassment, the cause of action shall be deemed accrued on the date the educational institution received actual knowledge of the discriminatory harassment. This statute of limitations shall be reset for each instance of conduct that is known to the educational institution, that constitutes discriminatory harassment as defined herein, and that involves the same parties to the harassment.

SEC. 7. EXEMPTIONS

(1) This Act shall not apply to:

(a) an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization; or

(b) an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine.

APPENDIX B

A BILL

To designate outdoor areas of public post-secondary educational institutions as traditional public forums open to free speech, and for other purposes.

Be it enacted by the [NAME of Legislature] assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the “Campus Free Expression Act.”

SEC. 2. RIGHT TO USE CAMPUS FOR FREE SPEECH ACTIVITIES.

- 1) Expressive activities protected under the provisions of this Act include, but not limited to, all forms of peaceful assembly, protests, speeches, distribution of literature, carrying signs, circulating petitions, and the recording and publication, including Internet publication, of video and audio recorded in public outdoor areas of public institutions of higher education;
- 2) The outdoor areas of campuses of public institutions of higher education that accept federal funding shall be deemed traditional public forums. Public institutions of higher education may maintain and enforce reasonable time, place, and manner restrictions in service of a significant institutional interest only when such restrictions employ clear, published, content- and viewpoint-neutral criteria and provide for ample alternative means of expression. Any such restrictions must allow for members of the university community to spontaneously and contemporaneously distribute literature assemble;
- 3) Any person who wishes to engage in noncommercial expressive activity on campus shall be permitted to do so freely, as long as their conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution, subject to the requirements of subsection 2 of this section. No public institution of higher education shall designate any area of its campus as a “free speech zone” or otherwise create policies restricting expressive activities to particular areas of campus;
- 4) Nothing in this Act grants students, faculty, or staff of the institution the right to materially disrupt previously scheduled or reserved activities in a portion or section of the campus at that scheduled time.

5) Nothing in this Act shall be interpreted as limiting the right of student expression elsewhere on campus.

SEC. 3. CAUSE OF ACTION.

1) The following persons may bring an action in a court of competent jurisdiction to enjoin violation of this Act and to recover compensatory damages, reasonable court costs, and attorneys' fees:

a) the attorney general;

b) persons whose expressive rights were violated through the violation of this Act;

2) In an action brought under this Section, if the court finds a violation of this Act, the court shall award the aggrieved persons no less than \$500 for the initial violation plus \$50 for each day the violation remains ongoing, which shall accrue starting on the day after the complaint is served on the institution of higher education. The total damages, excluding court costs and attorney's fees, available to a plaintiff or set of plaintiffs, in a case or cases stemming from a single controversy shall not exceed \$100,000 in total. In violations harming multiple plaintiffs, the court shall divide the damages equally among them until the maximum award is exhausted, if applicable.

SEC. 4. STATUTE OF LIMITATIONS.

1) ONE-YEAR LIMITATIONS PERIOD.

a) A person must bring suit for violation of this Act not later than one year after the day the cause of action accrues;

b) For purposes of calculating the one-year limitation period, each day that the violation of this Act persists, and each day that a policy in violation of this Act remains in effect, shall constitute a new violation of this Act and, therefore, a new day that the cause of action has accrued.

APPENDIX C

**Sixty-fourth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 6, 2015**

HOUSE BILL NO. 1471
(Representatives Looyesen, Rick C. Becker, Haak, Mock)
(Senators Grabinger, Luick)

AN ACT to create and enact a new section to chapters 15-10 and 15.1-06 of the North Dakota Century Code, relating to freedom of expression rights of students of public institutions of higher education and public schools.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 15-10 of the North Dakota Century Code is created and enacted as follows:

Student journalists - Freedom of expression - Civil remedy.

1. As used in this section:
 - a. "School-sponsored media" means any material that is prepared, substantially written, published, or broadcast by a student journalist at an institution under the supervision of the state board of higher education, distributed or generally made available to members of the student body, and prepared under the direction of a student media adviser. The term does not include any media intended for distribution or transmission solely in the classroom in which the media is produced.
 - b. "Student journalist" means a student of an institution under the supervision of the state board of higher education who gathers, compiles, writes, edits, photographs, records, or prepares information for dissemination in school-sponsored media.
 - c. "Student media adviser" means an individual employed, appointed, or designated by an institution under the supervision of the state board of higher education to supervise or provide instruction relating to school-sponsored media.
2. Except as provided in subsection 3, a student journalist has the right to exercise freedom of speech and of the press in school-sponsored media, regardless of whether the media is supported financially by the institution or by use of facilities of the institution or produced in conjunction with a class in which the student is enrolled. Subject to subsection 3, a student journalist is responsible for determining the news, opinion, feature, and advertising content of school-sponsored media. This subsection may not be construed to prevent a student media adviser from teaching professional standards of English and journalism to student journalists.
3. This section does not authorize or protect expression by a student that:
 - a. Is libelous or slanderous;
 - b. Constitutes an unwarranted invasion of privacy;
 - c. Violates federal or state law; or
 - d. So incites students as to create a clear and present danger of the commission of an unlawful act, the violation of institution or state board of higher education policies, or the material and substantial disruption of the orderly operation of the institution.

SECTION 2. A new section to chapter 15.1-06 of the North Dakota Century Code is created and enacted as follows:

Student journalists - Freedom of expression - Civil remedy.

1. As used in this section:
 - a. "School-sponsored media" means any material that is prepared, substantially written, published, or broadcast by a student journalist at a public school, distributed or generally made available to members of the student body, and prepared under the direction of a student media adviser. The term does not include any media intended for distribution or transmission solely in the classroom in which the media is produced.
 - b. "Student journalist" means a public school student who gathers, compiles, writes, edits, photographs, records, or prepares information for dissemination in school-sponsored media.
 - c. "Student media adviser" means an individual employed, appointed, or designated by a school district to supervise or provide instruction relating to school-sponsored media.
2. Except as provided in subsection 3, a student journalist has the right to exercise freedom of speech and of the press in school-sponsored media, regardless of whether the media is supported financially by the school district, by use of facilities of the school district, or produced in conjunction with a class in which the student is enrolled. Subject to subsection 3, a student journalist is responsible for determining the news, opinion, feature, and advertising content of school-sponsored media. This subsection may not be construed to prevent a student media adviser from teaching professional standards of English and journalism to student journalists.
3. This section does not authorize or protect expression by a student that:
 - a. Is libelous or slanderous;
 - b. Constitutes an unwarranted invasion of privacy;
 - c. Violates federal or state law; or
 - d. So incites students as to create a clear and present danger of the commission of an unlawful act, the violation of school district policy, or the material and substantial disruption of the orderly operation of the school.
4. A school district may not authorize any prior restraint of any school-sponsored media except when the media:
 - a. Is libelous or slanderous;
 - b. Constitutes an unwarranted invasion of privacy;
 - c. Violates federal or state law; or
 - d. So incites students as to create a clear and present danger of the commission of an unlawful act, the violation of school district policies, or the material and substantial disruption of the orderly operation of the school.
5. A school district may not sanction a student operating as an independent journalist.
6. Each school district shall adopt a written student freedom of expression policy in accordance with this section. The policy must include reasonable provisions for the time, place, and manner of student expression. The policy may also include limitations to language that may be defined as profane, harassing, threatening, or intimidating.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-fourth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1471.

House Vote: Yeas 86 Nays 0 Absent 8

Senate Vote: Yeas 46 Nays 0 Absent 1

Chief Clerk of the House

Received by the Governor at _____ M. on _____, 2015.

Approved at _____ M. on _____, 2015.

Governor

Filed in this office this _____ day of _____, 2015,

at _____ o'clock _____ M.

Secretary of State